Supreme Court, U.S.
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No._____

In The

Supreme Court of the United States

October Term, 1997

In re MARY ANNE O'REGAN, Petitioner

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Were Petitioner's ("O'Regan's") due process rights to a fair and impartial trial violated where the District Court judge ("Judge Leinenweber") failed to disqualify himself and failed to contradict serious and substantial allegations of spousal financial interest relating to his wife's relationship with a law firm which represented the opposing party after petitioner sought removal under 28 USC §144 and 28 USC §§ 455(a), (b)(1) and (b)(4)?

2. Whether mandamus is the exclusive vehicle for review of a recusal proceeding, and if so, does the right to a fair and impartial trial and due process demand that a recusal proceeding be remanded to another judge for a factual finding when the underlying facts have not been fully developed, or, in the alternative, Judge Leinenweber be ordered to fully respond to O'Regan's allegations set forth in her writ and amended writ of mandamus?

3. Was Judge Leinenweber's order denying O'Regan's motion for disqualification erroneous as a matter of law under 28 USC § 144 when he refused to accept as true all facts alleged in O'Regan's affidavit, and deliberately inquired into the facts raised in the affidavit with opposing counsel?

4. Is recusal under the non-financial provisions of 28 USC §455(b)(4) required where there is a clear danger that Judge Leinenweber would be distracted, might confuse the facts of O'Regan's sex and age discrimination case with those of the pending Mitsubishi sex discrimination and sex harassment case, and might discuss the case with his wife, Lynn Martin, former U.S. labor secretary, who secured her current position earning $2,200,000 as an employment practices consultant for Mitsubishi as a direct result of her association with the former law firm of Keck, Mahin & Cate ("KM&C") whose partners represented respondents in O'Regan's suit?

5. Do the partners of the former KM&C law firm who represented respondents have a duty to disclose their financial association with Judge Leinenweber's wife from which she was earning $2,200,000, at the same time Judge Leinenweber was issuing orders terminating O'Regan's case, and if so, are they liable for attorneys' fees incurred by O'Regan as a result of their failure to disclose?

6. Is the remedy of *vacatur* as articulated in *Liljeberg v. Health Services Acq. Corp.*, 486 U.S. 845 (1988) appropriate with respect to all orders entered by Judge Leinenweber after his wife, Lynn Martin began negotiating her consulting contract with Mitsubishi and engaged in prohibited acts with the KM&C law firm in early 1993?

LIST OF PARTIES

The plaintiff below was Mary Anne O'Regan.

The defendants below were respondents Arbitration Forums, Inc. ("AF") and Yvonne Weaver, individually and as President of AF. Other parties below were Judge Harry D. Leinenweber, United States District Court judge, Donald J. McNeil and Robert W. Pratt, partners of the former law firm of Keck, Mahin & Cate ("KM&C").

The Petitioner, Mary Anne O'Regan ("O'Regan") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit Court of Appeals did not issue any opinions, and its orders are reprinted in the Appendix hereto at A-1, A-2, and A-4. The ruling of the United States District Court for the Northern District of Illinois, Eastern Division has not been reported, and is reprinted at A-3.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals denying O'Regan's Petition for Mandamus was entered on December 5, 1997. A Petition for Rehearing with a Suggestion for Rehearing *en banc* was denied on January 20, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions involved in this case consist of 28 U.S.C. § 144, 28 U.S.C. § 455 (a), (b)(4) & (e), which are set forth in Appendix hereto at A-5 and A-6.

STATEMENT OF THE CASE

O'Regan filed her Amended Complaint in Case No. 95 C 6464 which included counts alleging age and sex discrimination on January 3, 1996. O'Regan charged that respondents, Arbitration Forums, Inc. ("AF") and its President, Yvonne Weaver ("Weaver"), initiated a company-wide plan and practice to terminate, fire, retire or force to resign seven experienced female middle-aged managers and replace them with young, inexperienced but physically

attractive, male employees. In furtherance of this plan and as a pretext to eliminate the remaining female managers, AF and Weaver summarily terminated O'Regan and three other female managers when they refused to sign a mandatory employment agreement which contained a 2-year nationwide non-compete provision as well as mandatory arbitration provisions as a condition of continuing employment.

In response to respondents' Rule 12(b)(6) motion, Judge Leinenweber granted their motion and effectively dismissed O'Regan's Amended Complaint and her Second Amended Complaint in their entirety on April 23, 1996. (Am. Pet., Gr. Ex. 9, p. 10).

The Seventh Circuit Court of Appeals reversed the dismissal of O'Regan's age and sex discrimination counts of her Second Amended Complaint on July 31, 1997.[1]

At the first status hearing after remand on October 30, 1997, O'Regan's counsel filed O'Regan's Motion for Disqualification of Judge, alleging that Judge Leinenweber should recuse himself under both 28 U.S.C. §§ 144 and 455 for numerous reasons including spousal financial interest, which O'Regan discovered one week before from newspaper articles relating to the dissolution of the KM&C law firm.

O'Regan alleged that Judge Leinenweber's spouse, Lynn Martin, the former U.S. Labor Secretary, had both a continuing economic relationship and engaged in "prohibited acts" with KM&C, the same law firm who represented the Defendants in O'Regan's case, whereby she was receiving consulting fees of $2,200,000[2] during the same time Judge Leinenweber had granted Defendants' Rule 12(b)(6) motion and dismissed the entire case against the Defendants.

As the *quid pro quo* for KM&C's steering this lucrative Mitsubishi consulting contract to his wife, Judge Leinenweber reciprocated and exemplified his bias and

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[1] *O'Regan v. Arbitrations Forums, Inc. et al*, 121 F.3d 1060 (7th Cir. 1997) and as amended on September 8, 1997.

[2] See Lodging 1 which highlights both Lynn Martin's economic relationship and her prohibited acts with the law firm of KM&C.

prejudice by ruling in favor of the respondents and the KM&C attorneys on every one of the more than fifteen substantive pre-trial motions and hearings to date, once going so far as to personally initiate and advocate novel arguments to justify his questionable ruling. (Am. Pet., Ex. 1, p.6, ¶15.) Judge Leinenweber denied O'Regan's recusal motion after a hearing on October 30, 1997. (A-3).

O'Regan sought appellate review of the District Court's order by means of a Petition of Mandamus. The Seventh Circuit Court of Appeals denied O'Regan's Petition for a Writ of Mandamus, her Motion for Leave to File her Amended Petition, and her Motion for Stay of Proceedings on December 2, 1997. (A-1, A-2). O'Regan's Petition for Rehearing with a Suggestion for Rehearing *en banc* was denied on January 20, 1998 without an opinion. (A-4).

REASONS FOR GRANTING THE WRIT

I. Conflicts: O'Regan respectfully urges this Court to exercise its supervising authority and resolve the conflicts among the circuits concerning whether mandamus is the proper and exclusive method in reviewing recusal actions, whether the assigned judge should be the sole decision maker in such proceedings and what are the appropriate standards to be used for granting mandamus.

A. Although all of the Circuits now permit mandamus in reviewing recusal actions, the circuits differ as to whether mandamus is the exclusive means in reviewing recusal actions. The Sixth Circuit became the last circuit to permit mandamus petitions following a refusal of a district court judge to disqualify himself, but considered it an option or substitute for appeal.[3] In contrast, the Seventh Circuit treats mandamus as the only method of correcting a judge's erroneous refusal to recuse himself where allegations under

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[3] *In re Aetna Casualty & Surety Co.*, 919 F.2d 1136, 1143 (6th Cir. 1990).

28 U.S.C. § 455(a) and § 455(b) are presented,[4] and questions under § 455(a) may not be raised on appeal.[5]

B. The Fifth and Sixth Circuits permit an independent hearing by another judge for a factual finding when the underlying facts in a recusal action have not been fully developed.[6] The Seventh Circuit holds that the issue of recusal should be made only by the judge sitting in the case,[7] effectively preventing any independent factual inquiry.

C. Lastly, the standards for granting mandamus petitions greatly vary. The Sixth and Ninth Circuits apply a five factor test to determine whether mandamus should be granted in a recusal case[8], while most of the other circuits employ the clear and indisputable standard.[9]

In summary, there is currently little conformity among the circuits regarding reasonable standards for mandamus in reviewing recusal actions. Hence, the success of a mandamus petition in recusal actions becomes more a function of which particular circuit the recusal action is brought rather than the merits of the particular case.

II. Importance: O'Regan's due process right to a neutral and detached judge[10] is too fundamental a right to be subject

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[4] *Union Carbide Corp. v. U.S. Cutting*, 782 F.2d 710, 713 (7th Cir. 1986).

[5] *Lac Du Flambeau Indians v. Stop Treaty*, 991 F.2d 1249 (7th Cir. 1993).

[6] *Health Services Acquisition v. Liljeberg*, 747 F.2d 1463 (6th Cir. 1984) (unpublished opinion); see also, *Liljeberg v. Health Services Acq. Corp.*, 486 U.S. 847, 851 (1988); *Easley v. University of Michigan Bd. of Regents*, 853 F.2d 1351, 1358 (6th Cir. 1988).

[7] *U.S. v. Balistrieri*, 779 F.2d 1191, 1202-03 (7th Cir. 1985).

[8] *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1078 (6th Cir. 1996); *King v. U.S. Dist. Court for Cent. Dist. Of Cal..*, 16 F.3d 992, 993 (9th Cir. 1994). While no single factor is determinative and all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, is dispositive. *Wilson v. U.S. Dist. Ct. for E.D. of California*, 103 F.3d 828 (9th Cir. 1996).

[9] This higher standard of review has been criticized when applied to recusal cases particularly when there is no independent adjudicator in the disqualification process. *See Questioning the Impartiality of Judges: Disqualifying Federal District Court Judges under 28 U.S.C. § 455(a)*, Temple Law Quarterly, Vol. 60, pp. 697, 734-35 (1987).

[10] *In re Murchison*, 349 U.S. 133, 136 (1955).

to such "hit or miss" mandamus standards, which sharply highlight the need for the exercise of supervisory authority to treat mandamus proceedings uniformly.

III. Error: When informed at the disqualification hearing by O'Regan's counsel that he was required to accept as true all facts alleged in O'Regan's affidavit under 28 U.S.C.144, Judge Leinenweber stated "that's ridiculous," and then proceeded to ask opposing counsel about various facts in O'Regan's affidavit, before denying O'Regan's motion for disqualification.[11] This statement, together with the deliberate in-court inquiry by Judge Leinenweber, constitute a blatant and reckless disregard for the rule of law as set forth in Berger,[12] where this Court held that the district court must determine only the sufficiency of the affidavit, not the truth of the allegations contained therein.

Furthermore, in response to O'Regan's recusal motion under 28 U.S.C. §§ 144, 455(a) and (b)(4), Judge Leinenweber had an affirmative duty to make a full and complete disclosure of all of the facts relating to his wife's economic relationship with the law firm of KM&C, which are in Judge Leinenweber's and KM&C's exclusive possession. The very integrity of the judicial system and public confidence in the system depend upon full disclosure of all the facts.[13] Therefore, his refusal to disclose such facts on the record as required by § 455(e),[14] his subsequent claim that such relationships were confidential[15] and his failure to appoint another judge constituted clear error. *Liljeberg v. Health Services Acquisition Corp.* 486 U.S. 847, 865 (1988).

CONCLUSION

For these reasons, this petition for writ of certiorari should be granted.

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[11] Am. Pet. for Mand., Ex. 3, pp. 10-11.

[12] *Berger v. United States*, 255 U.S. 22, 35 (1920).

[13] *United States v. Nixon*, 418 US. 708, 709 (1974).

[14] See Lodging 2 for the allegations Judge Leinenweber failed to answer.

[15] Judge Leinenweber's Partial Response, pp.1-2.

Respectfully submitted,

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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

December 2, 1997

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

IN THE MATTER OF:	] Application for Writ of
MARY A. O'REGAN,	] Mandamus
Petitioner	] Northern District of
	] Illinois, Eastern Division.
No. 97-3834	] No. 95 C 6464
	] Harry D. Leinenweber,
	] Judge.

The following are before the court:

1. PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, filed on November 10, 1997, by counsel for the petitioner.
2. MOTION FOR STAY OF PROCEEDINGS, filed on November 10, 1997, by counsel for the petitioner.
3. DECLARATION, filed on November 13, 1997, by Harry D. Leinenweber, United States District Court Judge.

4. DEFENDANT-RESPONDENT ARBITRATION FORUMS INC.'S ANSWER TO PETITION FOR WRIT OF MANDAMUS, filed on November 17, 1997, by counsel for respondent.
5. PETITIONER'S RESPONSE TO DEFENDANT'S MOTION FOR SANCTIONS, filed on November 24, 1997, by counsel for the petitioner.
6. PETITIONER'S RESPONSE TO JUDGE LEINENWEBER'S PARTIAL RESPONSE AND DEFENDANTS' ANSWER, filed on November 24, 1997, by counsel for the petitioner.
7. PETITIONER'S MOTION FOR LEAVE OF COURT TO FILE PETITIONER'S AMENDED PETITION FOR WRIT OF MANDAMUS AND FOR LEAVE TO FILE HER REPLY TO JUDGE LEINENWEBER'S PARTIAL RESPONSE AND DEFENDANTS' ANSWER, filed on November 24, 1997, by counsel for the petitioner.

IT IS ORDERED that #1, #2, and #7 are **DENIED. IT IS FURTHER ORDERED** that the defendants' request for sanctions is **DENIED.**

United States District Court, Northern District of Illinois

Name of Assigned Judge	Harry D. Leinenweber
Case Number	95 C 6464 **Date** 10/30/97
Case Title	Mary Anne O'Regan v. Arbitration Forums Inc.

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion presented.]

MOTION:

Plaintiff's Motion for Disqualification of Judge

DOCKET ENTRY:

(1) ■ Filed motion of [use listing in "Motion" box above]
(5) ■ Status hearing held and continued to 30 Jan. 98 at 9:00 A.M.
(10)■ [Other docket entry] Motion Denied Discovery order to commence

☒ No notices required, advised in open court.

Nov.05 1997 Docket
date docketed Number
67

"S/___"
docketing deputies initials

WAP courtroom deputy's initials

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

January 20, 1998
(and as amended on February 2, 1998)

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

IN THE MATTER OF:	] Application for Writ of
MARY A. O'REGAN,	] Mandamus
Petitioner	] Northern District of
	] Illinois, Eastern Division.
No. 97-3834	] No. 95 C 6464
	] Harry D. Leinenweber,
	] Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause on December 12, 1997, by counsel for the petitioner, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing.

Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc*, and the same is hereby, **DENIED.**

STATUTES INVOLVED

28 U.S.C. § 144

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 455 Disqualification of justice, judge or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; ...

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(c) A judge should inform himself about his personal and fiduciary financial interest, and make a reasonable effort to inform himself about the personal financial interest of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated: ...

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that....

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arise only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.